COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 151

MRS. JOHN S. MEADOWS,

Petitioner,

vs.

THE IRVING TRUST COMPANY, AS TRUSTEE OF UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ET ALS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S REPLY BRIEF.

PERLIE P. FALLON,
Counsel for Petitioner.

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PETITIONER'S REPLY BRIEF.

I.

The distinction respondents make in the argument under "(1)" between "surrender of the premises" and "surrender of the lease" does not meet the petitioner's case. The point made is that Sec. 77B (b) (10) contemplated both of these terms. The entire language used in the section is relied upon. Respondents have not explained away the other language of the statute analyzed at page 8 of the petition, in the first paragraph, under "Reasons For Granting The Writ." They have not explained how the section can create a damage claim, and stop the accrual of rent, as it expressly does, and not contemplate a surrender of the lease.

It does not help respondents to claim petitioner would create rights where none might otherwise exist. This argument proves too much. Sec. 77B (b) (10) expressly refers to a rejection in a bankruptcy proceeding pending prior. We have here a definite situation, namely: a bankruptcy pending prior, and the statute itself says that if the lease was rejected by a Trustee in a proceeding pending prior, a person injured shall be a creditor in the new proceeding. The petitioner asks the court to construe the reference to a proceeding pending prior, which the lower court has written out of the statute, and its relation to surrender as defined in the entire language used in Sec. 77B (b) (10).

The respondents accept petitioner's point that "surrender of the premises" refers to an act of the Trustee in rejecting the lease. Since the statute later says rent as such stops on such surrender the result goes to the lease and not the possession. The act of rejection by a trustee becomes an act of termination. It would ride in the very face of the statute to permit a lessor to leave the premises idle, after a surrender of the premises, and prove upon the lease for the rent as stipulated. The words "plus unpaid rent accrued up to such date of surrender or reentry" and the reference to injury have a place in the statutory scheme.

II.

With respect to the covenant to build respondents have not met the point that the covenant was an *independent* covenant. Petitioner showed that it was expressly set apart from rent, was personal, and not assignable, and is found after tax and repair covenants which are independent.[1] That point makes the claim allowable in bankruptcy under Sec. 63 a (4) and the decision in *Irving Trust Co.*

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[1] *Hodgkins* v. *Price*, 137 Mass. 13, 19 (1884).

v. *Perry*, 293 U. S. 307. Respondents admit this part of the claim was within the Rider (bottom of page 6).

III.

In footnote 1, on page 3, respondents suggest the claim was barred by release. This point was decided against the respondents in the lower court, in the case at bar, upon the following grounds:

The repairs were admittedly an allowable claim in the bankruptcy pending prior (R. 111, fol. 333) and the taxes in the present proceeding (R. 56, fol. 166). Thus claims survived the agreement into the bankruptcy proceedings and into these proceedings. Accepting the respondents' interpretation, for purposes of argument, and the admissions, the document was not a release: it did not extinguish the debt: it was a covenant not to sue.[1] The covenant to build and the taxes were claims properly filed in the prior proceedings and undetermined therein, (R. 76, fol. 228). The United admits that it removed its assets, described in the Rider as "the bankrupt estate", from the proceeding pending prior (R. 79, 80, fols. 236 to 241), while petitioner was prosecuting the claims (R. 76, fol. 228). The United

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[1] Release extinguishes the debt. Keilway, p. 89-2 and p. 90-8 (22 Hen. 7); 72 Eng. Reprint 251, 252: "*Nota que Fineux chiefe Justice dit * * * mes son release va en mere extinguishment.*"

The rule is applied to bankruptcy in *Bateson* v. *Gosling*, L. R. 7 Common Pleas, 9 (1871).

The distinction between a release and a covenant not to sue is made in: *Garnett* v. *Macon*, Fed. Cas., 5245, 2 Brock. 185, 10 Fed. Cases 12, Cir. Ct. East Dist. of Va. (1825) (Marshall, J.); *The Thomas P. Beal*, 298 Fed. Rep. 121, 122 (1924). *Barnet* v. *Conklin*, 268 Fed.. Rep. 177, 182, C. C. A. 8 (1920). *Jackson* v. *Stackhouse*, 1 Cowan, 122 (1823), *Williston, Contracts*, Sec. 1823.

breached the covenant, even in its own narrow interpretation of it, and may not stand on it.[2] This explains why the lower court did not, in the case at bar, affirm upon the ground of release.

Also, it was expressly held that the claim was an exception by the agreement. (R. 288, last paragraph of majority opinion, and R. p. 289, first paragraph of concurring opinion). Neither of these holdings was in any way modified in the case at bar, upon the petition for reargument (R. p. 291, fol. 304).

IV.

In "(3)" page 6 referring to the concurring opinion, the respondents have evidently failed to read the foot note on page 6 of the petition. There it was shown by quotations from the lease that the concurring opinion misread the lease. The other two judges read the entire lease including paragraph "Twenty-seventh" (R. 33, fol. 99, at p. 34, fol. 101) which reserved to the petitioner "any of the rights or remedies provided for in this lease or *otherwise allowed by law,*" and rejected the position of the concurring opinion. The existence of the Rider also rejects the position.

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[2] *Turner* v. *Browne*, L. R. 3 Common Bench, 157, 136 Eng. Reprint 63 (1846); *Ex Parte Bennet*, 2 Atk. 527, 26 Eng. Reprint 716 (1743); *Memphis* v. *Brown*, 20 Wall., 289, 308 (1873); *Clark* v. *Bowen*, 63 U. S. (22 Howard) 270, 273 (1859); *In re A. B. Carton & Co.*, 148 Fed. Rep. 63 (1906); *Shubert* v. *Rosenberger*, 204 Fed. Rep. 934, 938, C. C. A. 8, (1913); *Ranson* v. *Geer*, 20 Blatchford, 535, 537, So. Dist. of N. Y. (1882).

St. Louis I. M. PS. Ry. Co. v. *Clark*, 51 Fed. Rep. 483, 486, C. C. A. 8 (1892): "* * * but when the railway company subsequently changed the situation * * * it thereby revived the claim on behalf of complainants."

V.

In foot note 2, on page 3 of the brief, respondents suggest the assets are now held by a trustee and have not been "recaptured" or "restored." The legal title of the trustee in bankruptcy has been divested by the provisions of subdivision (i) of Sec. 77B and upon the debtor's petition (R. 79, fol. 237).

VI.

The respondents make a point, in stating the facts, that the sub-rents accrued and to accrue from September 1st were assigned. The Trustee in Bankruptcy of the United established, as the law of that proceeding, that a rejection relates back to the date of the bankruptcy, that the trustee has no interest in sub-rents which accrue between the date of petition filed and the surrender, that the lessor has a lien on such rents. *In re United Cigar Stores of America, Rosenwebers* v. *Irving Trust Co.,* Trustee, 2 C. C. A., 69 F. (2d) 513 (1934). See also *Westinghouse Electric & Mf. Co.* v. *Brooklyn Rapid Transit Co.,* C. C. A. 2, 6 F. (2d) 547, 549 (1925) and *Penn Steel Co.* v. *New York City Ry. Co.,* C. C. A. 2, 198 Fed. Rep. 721 (1912). Thus in the agreement the parties were treating the trustee's action as a rejection, in accordance with their agreement, Ex. Q. (R. 191), that the lease was rejected, and following the law which the Trustee in Bankruptcy established in Rosenwebers' case. The rejection is a question of law since it involves the construction of the Bankruptcy Act and a written agreement, Ex. Q. (R. 191).

VII.

A reading of respondents' brief and the opinions below makes clear that the petition presents the construction of

Sec. 77B (b) (10) of the Bankruptcy Act with respect to leases, and, the determination of the manner in which Congress intended, by its reference to proceedings pending prior, to adopt the new remedy under the bankruptcy power, granted by Sec. 77B, to proceedings pending prior. This Court may take judicial notice of the extent to which this statute is being used by citizens and of the public importance of a conclusive determination of the matters raised by the petition. The decision with respect to the covenant to build is in conflict with the decision of this Court in *Irving Trust Company* v. *Perry*, 293 U. S. 307. The conflicts in the decisions in the Circuit Courts of Appeal as to the covenant to build are set out in the first paragraph on page 12 of the petition. They are not removed by respondents' mere denial.

PERLIE P. FALLON,
Counsel.

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